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September 4, 2021

Re: *In re: Clearview AI, Inc. Consumer Privacy Litigation*,
1:21-cv-00135

Dear Judge Coleman:

We write on behalf of Defendants Clearview AI, Inc., Hoan Ton-That, Richard Schwartz, Rocky Mountain Data Analytics LLC, and Thomas Mulcaire (collectively, the “Clearview Defendants”) to bring to the Court’s attention the September 2, 2021 decision of the Eighth Circuit in *Ness v. City of Bloomington*, --- F.4th ---, 2021 WL 3918886 (8th Cir. Sept. 2, 2021). This decision is relevant to the Clearview Defendants’ pending motion to dismiss in *In re Clearview AI, Inc. Consumer Privacy Litigation*. In *Ness*, the Eighth Circuit struck down on First Amendment grounds a municipal ordinance forbidding photography and video recording of children in public parks without parental consent. *Id.* at *1. The court found that the ordinance was a content-based restriction on speech requiring strict scrutiny, a test that the ordinance could not meet. *Id.* at *6.

The Eighth Circuit held that strict scrutiny was required because “city officials must examine the content of the speech to determine whether it is prohibited.” *Id.* Specifically, to determine whether plaintiffs’ photography or video recordings were prohibited by the ordinance, “an official must examine the content of the photograph or video recording to determine whether a child’s image is captured.” *Id.* As a result, the ordinance could not stand.

The same reasoning applies in this case because in order to determine whether the Clearview Defendants have violated the Illinois Biometric Information Privacy Act (“BIPA”), an examination must be conducted into whether the content of material created by Defendants contains biometric information or biometric identifiers. 740 ILCS 14/15. In both instances an examination of content must be made. Therefore, as in *Ness*, strict scrutiny is warranted here. And, as detailed in the Clearview Defendants’ motion to dismiss, Plaintiffs in this case do not even maintain that BIPA could withstand strict scrutiny.

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We respectfully submit that the *Ness* decision further supports granting the Clearview Defendants' motion to dismiss.

Respectfully Submitted,

By: /s/ Floyd Abrams

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